



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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July 20, 2015

Mr. Daniel Suddeath
318 Pearl Street
New Albany, IN 47150

Re: Formal Complaint 15-FC-186; Alleged Violation of the Access to Public Records Act by the City of New Albany and the New Albany Police Department

Dear Mr. Suddeath,

This advisory opinion is in response to your formal complaint, which alleges the City of New Albany ("City"), New Albany Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* On June 29, 2015, the Board responded to your complaint via Mr. Shane L. Gibson, Esq., Corporate Counsel. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-3-3, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on June 12, 2015.

BACKGROUND

Your complaint dated June 12, 2015 alleges the City of New Albany ("City"), New Albany Police Department ("Department") and Mr. Shane Gibson, Esq., violated the Access to Public Records Act by failing to provide the records you requested.

On May 27, 2015, you requested a copy of a former officer's disciplinary record. You also sent a request for the report created by a private firm relating to the investigation of said officer's claims.

On June 12, 2015, Counselor Gibson denied your request for records. He stated the records had yet to be considered disciplinary records because a decision was pending, the finality of which would be required before the records could be released.

On June 29, 2015, the City responded to your formal complaint. It notes the records requested are related to allegations made by the former officer against the Department. The report you requested was created by a private law firm in preparation for litigation on the officer's claims. The City has cited attorney-client privilege and work-product to



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justify an exemption from disclosure. Additionally, the City notes the APRA protects personnel files from being disclosed.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." See Ind. Code § 5-14-3-1. The City of New Albany and New Albany Police Department are public agencies for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City's or the Department's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

Generally, the release of personnel files of public employees is at the discretion of a public agency. Nothing in APRA calls for the full disclosure of a personnel file or a disciplinary file. However, the Access to Public Records Act includes a number of exceptions to the discretion including the factual basis of any disciplinary action.

According to Ind. Code § 5-14-3-4(b)(8), the statute mandates the release of "(B) information relating to the status of any formal charges against the employee; and (C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted or discharged."

Factual basis is never defined in APRA. In (*Opinion of the Public Access Counselor 09-FC-75*), the Public Access Counselor concluded the agency did not have to create a record which gave a factual basis if one did not already exist. In (*Opinion of the Public Access Counselor 11-FC-149*), the Public Access Counselor said that a short, cursory statement as to why the disciplinary action was taken was sufficient.

Although the employee had not yet exhausted the entirety of her administrative remedies, disciplinary action was indeed taken. Regardless of the outcome of any appeals – internally or externally – a factual basis should have been given on or about June 12, 2015. If a document with a factual basis existed at the time of your original request (whether the Merit Commission ratified the action or not), it should have been disclosed.



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Furthermore, the APRA does allow attorney work product to be withheld from disclosure. Work product is defined as:

“[t]he work product of an attorney representing, pursuant to state employment or an appointment by a public agency: (A) public agency; (B) the state; or (C) the individual.” See. Ind. Code § 5-14-3-4(b)(2). See also Ind. Code § 5-14-3-2(r):

"Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation. The term includes the attorney's:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories and conclusions.

In order for the work product exception to apply, the records would first need to be created by an individual in their capacity as an attorney or an agent thereof. This requirement appears to have been met, because the report was created by Kightlinger and Gray (K&G) in anticipation of litigation against the City and an EEOC complaint against the Department. Although the report was created by a third-party, it was germane to the firm's representation and was done at the direction and behest of the firm in anticipation of litigation.

Finally, this report was clearly intended to be part of employee's personnel file. It was created specifically for human resources purposes. It matters not they are 'labeled' as such by the Merit Commission, the Commission deals exclusively with personnel matters and it stands to reason any document generated as part of an appeal would become part of a personnel file.

All this being said, I do not believe a short, cursory statement is always sufficient to satisfy the General Assembly's intention to make the factual basis of discipline known to the public. There is a balance between the public's right to know how their representative governments handle personnel matters and the individual privacy rights of public employees. To the extent a document with a satisfactory factual basis exists, it should be released. The release of the entirety of 'disciplinary file', however, is at the discretion of the agency.



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Regards,

A handwritten signature in black ink, appearing to read "LH Britt", with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Mr. Shane L. Gibson, Esq.